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Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM 1995

TARGET SPORTSWEAR, INC.,

Petitioner,

—v.—

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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February, 1996

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QUESTIONS PRESENTED FOR REVIEW

Whether the President was authorized by section 204 of the Agricultural Act of 1956 (7 U.S.C. § 1854 (1988)) to promulgate an interim regulation (19 C.F.R. § 12.130(c)(2) which declares a textile product of a U.S. insular possession to be treated as a product of a foreign country soley because of minor processing in a foreign country.

Whether the authority delegated to the President under section 204 grants unlimited authority to the President to restrict imports of textile articles into the United States and. therefore, violates Article 1, Section 8, Clause 3 of the Constitution of the United States.

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THE UNITED STATES,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF GROUNDS FOR JURISDICTION

Petitioner files this petition for a writ of certiorari with respect to the decision in *Target Sportswear, Inc.* v. *United States*, 70 F.3d 604 (Fed. Cir. 1995) (Appeal No. 93-1212), which was rendered by the United States Court of Appeals for the Federal Circuit ("CAFC") on November 17, 1995. In its decision, the CAFC affirmed the judgment order of the United States Court of International Trade in *Id.* v. *Id.*, 19 CIT ___, Slip Op. No. 95-7, 875 F. Supp. 835, (Ct. Int'l Trade 1995) upholding the validity of the Customs Service's interim regulation pursuant to which the petitioner's goods were denied importation into the United States from the U.S. Virgin Islands.

The Supreme Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254 (1988).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article 1, Section 8, Clause 3 of the Constitution of the United States provides as follows:

> Section 8. The Congress shall have the Power. . .
>
> * * *
>
> To regulate Commerce with foreign Nations, . . .

Section 204 of the Agricultural Act of 1956[1] provides that:

> The President may, whenever he determines such action appropriate, negotiate with representatives of *foreign governments* in an effort to obtain agreements limiting the export from such countries and the importation into the United States of any agricultural commodity or product manufactured therefrom or textiles or textile products, and the President is authorized to issue regulations governing the entry or withdrawals from warehouse of any such commodity, product, textiles, or textile products to carry out any such agreement. [Emphasis added.]

Section 12.130(c)(2) of the Customs Regulations[2] states that:

> Unless otherwise required by law, the rules of origin applicable to products of the U.S. shall also apply to products of insular possessions of the U.S. Accordingly, notwithstanding paragraph (b) of this section, for pur-

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1 7 U.S.C. § 1854 (1988).

2 19 C.F.R. § 12.130(c)(2) (1993).

poses of section 204, Agricultural Act of 1956, as amended, products of insular possessions of the U.S., if imported into the U.S. after having been advanced in value, improved in condition, or assembled, outside the insular possessions shall not be treated as products of those insular possessions.

STATEMENT OF THE CASE

A. The Petitioner And Its Facility In The U.S. Virgin Islands.

Petitioner is one of the few substantial manufacturers of men's tailored clothing remaining in the United States. Petitioner and its affiliated companies currently employ approximately 1,100 American workers at men's clothing plants in Pennsylvania, Kentucky and Florida. In the late 1980's, Altan Mfg. Co., Inc., a U.S. corporation located in the U.S. Virgin Islands and an affiliate of petitioner, was formed to construct a facility to manufacture men's clothing on St. Croix, U.S. Virgin Islands. At its facility in the Virgin Islands, Altan planned to cut fabric and fabricate components which would then be sent to an unrelated facility in the Dominican Republic for partial assembly. The partially assembled garments would then be returned to the Virgin Islands for completion and shipment to the U.S. mainland.

Prior to making a capital investment and committing extensive human resources, petitioner sought and obtained two Rulings from U.S. Customs Service Headquarters. These Rulings concluded that the fabric brought to the U.S. Virgin Islands would be subjected to manufacturing operations which would constitute a "substantial transformation" resulting in "products of the U.S. Virgin Islands" for purposes of Headnote 3(a) of the Harmonized Tariff Schedule of the United States ("HTSUS"). Importantly, the Customs Service also ruled that the partial assembly operations in the Dominican

Republic would not constitute a "substantial transformation." The Rulings remain in full force and effect.[3]

Based on the two Rulings and the various federal regulations and judicial and administrative decisions, Altan constructed its producing facility in the late 1980's (and rebuilt the facility after its destruction by Hurricane Hugo.) Altan commenced start-up operations in 1992 and, today, Altan employs approximately 40 workers in the U.S. Virgin Islands.

B. The Interim Regulation In Issue.

On April 14, 1993, the interim regulation in issue was published in the Federal Register;[4] the interim regulation became effective 30 days later, on May 14, 1993. There was no prior notice and the public was not given an opportunity to comment before the effective date.

The Customs Service ("Customs") promulgated the interim regulation at the request of the Committee for the Implementation of Textile Agreements ("CITA") which was established by Executive Order 11651 on March 3, 1972, to supervise the implementation of textile agreements. Section 2(a) of that Executive Order requires the Commissioner of Customs to take such actions as CITA, through its Chairperson, recommends to carry out agreements entered into by the United States pursuant to section 204 of the Agricultural Act of 1956.[5]

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[3] Customs Service Headquarters Rulings CLA-2 CO:R;CV;V 554027 MBH (Jan. 13, 1987); CLA-2 CO:R:CV:V 554025 MBH (Dec. 16, 1986). It should be recognized that even without the Rulings, petitioner's wool suits in issue are products of the U.S. Virgin Islands since the suits were last substantially transformed in the U.S. Virgin Islands. See, 19 C.F.R. § 12.130(b) (1993).

[4] *Country of Origin of Textile Products From U.S. Insular Possessions*, 58 Fed. Reg. 19347, 19349 (April 14, 1993).

[5] 7 U.S.C. § 1854 (1988).

One such agreement exists between the U.S. and the Dominican Republic. The U.S. and the Dominican Republic are two of 50 nations which, in December 1973, under the aegis of the General Agreement on Tariffs and Trade, concluded the Multi-Fiber Arrangement Regarding International Trade in Textiles, commonly referred to as the Multi-Fiber Arrangement ("MFA").[6] The MFA encourages signatory nations to negotiate and execute bilateral agreements. The U.S. and the Dominican Republic entered into a bilateral agreement on January 20, 1989, pursuant to which the Dominican Republic agreed to limit the quantities of certain textile products which could be exported to the U.S. The quantities were to be negotiated periodically. The Dominican Republic agreed to control exports by the issuance of export visas.

The practical effect of the interim regulation is that petitioner's suits are products of the U.S. Virgin Islands according to the Rulings issued by Customs, the applicable regulations and numerous judicial decisions, but, for quota purposes, are products of the Dominican Republic and must be denied entry unless accompanied by a visa issued by the Government of the Dominican Republic.

Accordingly, on December 9, 1993, petitioner attempted to import ("enter") a shipment of its wool suits from the U.S. Virgin Islands by presenting Entry No. 122-4521169-8. A visa issued by the Dominican Republic did not accompany the shipment. The Customs Service's Area Director at JFK International Airport rejected the entry and refused to allow the U.S. Virgin Islands wool suits to enter the United States solely on the ground that it did not conform to the requirements of the interim regulation, section 12.130(c)(2) of the Customs Regulations.

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[6] 25 U.S.T. 1001, T.I.A.S. 7840, 39 Fed. Reg. 13308 (1973). Pursuant to article 16 of the MFA, the multilateral treaty initially remained in effect for four years. The signatories have extended the agreement every few years.

The interim regulation flies in the face of all former precedent and effectively destroys the commercial value of Altan's facility in the U.S. Virgin Islands.

C. Summary of Issues Presented.

The new interim regulation declares petitioner's Virgin Islands products to be foreign products for quota purposes. Respondent asserts that the authority for the interim regulation is section 204 of the Agricultural Act of 1956 which delegates authority to the President to negotiate and enter into bilateral agreements with foreign governments to limit imports of textile products of those foreign countries. Respondent further asserts that section 204 permits restrictions on imports of textile products originating in an insular possession of the United States.

Petitioner avers that this matter involves an important federal question which should be settled by the Supreme Court.

This case addresses the extent to which the Congress has delegated its constitutional power to regulate foreign trade under section 204. The threshold question is whether the Customs Service, as an Executive arm, is authorized by section 204, to issue a regulation declaring textile products of an insular possession of the United States to be products of a foreign country because some additional work (insufficient to change the country of origin) was performed in the foreign country.

Petitioner contends that the Customs Service's authority to regulate foreign commerce is limited by the plain language of section 204. U.S. insular possessions are not foreign countries and, in the absence of legislation authorizing such treatment, may not be treated as a foreign country. Congress, not the Customs Service, controls the Nation's foreign trade and its insular possessions.

DECISION UNDER REVIEW

In its *Target Sportswear* decision,[7] the CAFC affirmed the decision of the trial court which found that interim section 12.130(c)(2) of the Customs Regulations[8] is a valid exercise of authority granted to the President under section 204. The Court determined that the grant of authority to the President under section 204 is broad and without "procedural requirements nor limitations." Citing its own decision in *American Ass'n of Exporters and Importers-Textile and Apparel Group* v. *United States*[9] ("*AAEI*") and in *Mast Industries, Inc., et al.* v. *United States*,[10] the CAFC held that the authority delegated by Congress to the President permitted an agency to restrict the importation of textile products of the U.S. Virgin Islands because some work was done in the Dominican Republic.[11] Further, the CAFC observed that the interim regulation in question is relevant to the enforcement of the bilateral textile agreement with the Dominican Republic and serves to "carry out" bilateral agreements struck under section 204.

REASONS FOR GRANTING PETITION FOR A WRIT OF CERTIORARI

I. The Interim Regulation Was Not Authorized By Section 204 of the Agricultural Act of 1956.

The CAFC erred in holding that section 204 authorized the Customs Service to issue the interim regulation (section 12.130 (c)(2)) and that, pursuant to this regulation, the Cus-

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7 70 F.3d 604 (Fed. Cir. 1995).

8 19 C.F.R § 12.130(c)(2) (1993).

9 751 F.2d 1239 (Fed. Cir. 1985).

10 8 CIT 214, 596 F. Supp. 1567 (Ct. Int'l Trade 1984).

11 Citing *AAEI*, the Court stated that "Section 204 'imposes no restrictions on the President's administration of the textile program. There are no procedural requirements nor limitations. . . .' " *Id.*, n. 7, at 607.

toms Service properly required the petitioner to present a Dominican Republic textile visa in order to import products of the United States Virgin Islands. To the contrary, section 204 authorizes restrictions only on products of foreign countries.

The Constitution of the United States vests the Congress with the sole power to regulate imports into the United States from foreign countries.[12] In the exercise of this power, Congress may delegate certain of its authority to the President. However, a regulation issued by an Executive agency pursuant to delegated authority must be consistent with the statutory provisions enacted by Congress and must be within the bounds or limits set by the enabling legislation.[13]

Section 204 authorized the President:

(i) to negotiate textile agreements with *foreign governments* limiting the exportation of textile products to the United States, and

(ii) to issue regulations required to carry out such textile agreements.[14]

The legislative histories of the Agricultural Act of 1956 and of the Trade Expansion Act of 1962 (which amended section

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[12] Article 1, Section 8, Clause 3, Constitution of the United States. *See also, United States* v. *Yoshida International, Inc.*, 526 F.2d 560, 571 (CCPA 1975), wherein the Court of Customs and Patent Appeals stated that: "The people of the new United States in adopting the Constitution, granted the power to 'lay and collect duties' and to 'regulate commerce' to the Congress, and not to the Executive. U.S. Constitution, Art. 1, Sec. 8, Clauses 1 and 3."

[13] *Spears* v. *Merit Systems Protection Board*, 766 F.2d 521, 523 (Fed. Cir. 1985), citing *Commissioner of Internal Revenue* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948) and *Fawcus Machine Co.* v. *United States*, 282 U.S. 375, 378 (1931). Regulations issued under a statutory mandate, especially where the constitutional power is vested in the Congress, cannot exceed the authority conferred by the statute.

[14] *Id.*, p. 2.

204) emphasizes that Congress intended "products" to mean "foreign goods" which are the "growth, manufacture, or produce" of *foreign* countries. Congress intended section 204 to apply to products either wholly manufactured or substantially transformed in a foreign country.[15]

The U.S. Virgin Islands is an insular possession of the United States and not a foreign country.[16] Accordingly, the interim regulation is not authorized by section 204 and is unlawful and *ultra vires*.

II. The Interim Regulation Does Not "Carry Out" Any Bilateral Textile Agreement.

The CAFC decided that section 204 authorizes the new interim regulation because it is relevant to the enforcement of an existing textile agreement[17] citing *American Association of Exporters and Importers-Textile and Apparel Group* v. *United States*.[18] The facts in the *AAEI* case established that the products in issue were of Chinese origin and fell under the U.S.-China bilateral treaty. The Court concluded that the chal-

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[15] The test of substantial transformation used to determine the origin of an imported article was formulated by this Court in *Anheuser-Busch Brewing Association* v. *United States*, 207 U.S. 556, 562 (1908) wherein the Court held that an imported product is a product of the country or place in which the last "substantial transformation" took place or where a new and different article emerged. This test has been uniformly applied by the courts to determine the country of origin. In fact, this substantial transformation rule was adopted by the Customs Service when it promulgated the country of origin rules for textiles and textile products as section 12.130(b) of the Customs Regulations, under section 204 of the Agricultural Act of 1956, originally. 19 Cust. Bull. 58, 92, T.D. 85-38, published in 50 Fed. Reg. 8723, March 5, 1985.

[16] *See, De Lima* v. *Bidwell*, 182 U.S. 1 (1901); *Dooley* v. *United States*, 182 U.S. 762 (1901).

[17] *Id.*, p. 7, 70 F.3d at 607.

[18] *Id.*, n. 9, at 1247.

lenged quotas on products originating in China were relevant to the treaty's enforcement.

Here, petitioner's suits do not come under the U.S.-Dominican Republic bilateral treaty because they are not products of the Dominican Republic and the bilateral agreement does not encompass goods of the U.S. Virgin Islands. Since the goods in question did not originate in the Dominican Republic (or, in fact, in any foreign country) section 12.130(c)(2) is not relevant to the enforcement of any existing textile agreement. Thus, reliance on the decision in *AAEI* is misplaced.[19]

Lastly, the CAFC relied on *Yuri Fashions Co.* v. *United States*.[20] In that case, the importer sought to obtain entry of sweaters shipped to the United States directly from the Northern Mariana Islands, the equivalent of a U.S. insular possession. The sweaters were excluded from entry for the lack of the requisite export textile visa issued by the Korean Government under the bilateral agreement with Korea since the sweaters were regarded as Korean products. The Court of International Trade, in sustaining the exclusion of the merchandise without a Korean export visa, expressly recognized that the sweaters were of Korean origin and that the processing done in the Northern Marianas did not change their Korean origin. But in the case at bar, the origin of the wool suits is the U.S. Virgin Islands, a fact not in dispute. The conclusion reached by the Court in *Yuri* to sustain the exclusion of the sweaters without a Korean textile visa was based upon the fact that the sweaters were Korean. Thus, *Yuri*[21] does not support the conclusion that the application of section

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[19] Likewise, *Florsheim Shoe Co.* v. *United States*, 751 F.2d 787 (Fed. Cir. 1984) involved leather originating in India, not a product of a U.S. insular possession.

[20] 632 F. Supp. 41 (Ct. Int'l Trade 1986) *aff'd* 804 F.2d 1246 (Fed. Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987).

[21] *Id.*, n. 20.

12.130(c)(2) here is relevant to the bilateral agreement with the Dominican Republic or with any other foreign country.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Supreme Court of the United States enter an order granting the petition for a writ of certiorari.

Dated: New York, New York
February, 1996

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 95-1212

TARGET SPORTSWEAR, INC.,

Plaintiff-Appellant,

—v.—

UNITED STATES,

Defendant-Appellee.

Bernard J. Babb, Wasserman, Schneider & Babb, of New York, New York, argued for plaintiff-appellant. With him on the brief was *David M. Steiner*.

Rhonda K. Schmare, Attorney, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellee. With her on the brief were *Frank w. Hunger*, Assistant Attorney General and *David M. Cohen*, Director.

Appealed from: U.S. Court of International Trade

Judge Newman

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 95-1212

TARGET SPORTSWEAR, INC.,

Plaintiff-Appellant,

—v.—

UNITED STATES,

Defendant-Appellee.

DECIDED: November 17, 1995

Before LOURIE, *Circuit Judge*,
COWEN, *Senior Circuit Judge*, and SCHALL, *Circuit Judge*.

COWEN, *Senior Circuit Judge*.

Appellant, Target Sportswear, Inc. (Target), appeals the decision of the United States Court of International Trade granting summary judgment for the United States and dismissing Target's challenge to an interim regulation promulgated by the United States Customs Service, Department of the Treasury (Customs). *Target Sportswear, Inc. v. United States*, 875 F. Supp. 835 (Ct. Int'l Trade 1995). We affirm.

BACKGROUND

Target, through its affiliate Altan, Inc., imports suits from the United States Virgin Islands (U.S. Virgin Islands) into the United States. The U.S. Virgin Islands is an insular possession of the United States. 48 U.S.C. § 1392 *et seq.* (1994).

On December 9, 1993, Customs refused to allow entry of twelve mens suits shipped by Target from the U.S. Virgin Islands because the suits were not accompanied by a textile export visa from the Dominican Republic. Customs required an export visa because an interim regulation classified the suits as products of the Dominican Republic, as opposed to products of the U.S. Virgin Islands, for purposes of a quota restriction on Dominican Republic textiles. *See* 19 C.F.R. § 12.130(c)(2) (interim regulation). Customs promulgated the interim regulation pursuant to section 204 of the Agriculture Act of 1956.[1] 7 U.S.C. § 1854 (1994) (§ 204). Section 204 delegates to the President the power to enter into trade agreements that limit the import of textiles or textile products from foreign countries and the power to promulgate regulations that implement such agreements.[2] Pursuant to § 204 and the multinational Multi-Fiber Arrangement Regarding International Trade in Textiles, the United States and the Dominican Republic entered into a bilateral agreement that established the quota restriction applied to Target's suits.

Target contends that the suits were improperly denied entry, because the interim regulation exceeds the scope of the President's authority under § 204. The suits were produced by cutting unmarked fabric, lining and interlining into garment pieces in the U.S. Virgin Islands. The cut pieces were joined

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[1] At the recommendation of the Committee for the Implementation of Textile Agreements ("CITA"), Customs enacted the interim regulation under the authority of the President. In this case, there is no issue concerning the intra-executive branch delegation of authority from the President to CITA and Customs.

[2] The Constitution provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations . . . ." U.S. Const. art. I, § 8, cl.3. This power may be delegated to the Executive. *California Bankers Ass'n. v. Shultz*, 416 U.S. 21, 59 (1974).

to form components, where appropriate, and then were shipped to the Dominican Republic. In the Dominican Republic, the components were sewn together. The garments were returned to the Virgin Islands for finishing, and were then shipped to the United States for import.

It is undisputed that the suits underwent their "last substantial transformation," which is an established test in customs law for determining the country of origin of a product that was processed in multiple locales, in the U.S. Virgin Islands. The challenged interim regulation, however, provides that textile products exported from an insular possession that were "advanced in value, improved in condition, or assembled" in a foreign country cannot be treated as a product of the insular possession. 19 C.F.R. § 12.130(c)(2) (1995). Under the interim regulation, it is undisputed that the suits at issue are treated as a product of the Dominican Republic for purposes of the quota imposed by the bilateral agreement, notwithstanding the fact that the suits underwent their last substantial transformation in the U.S. Virgin Islands.

DISCUSSION

In arguing that the interim regulation is *ultra vires*, Target posits that § 204's delegation of authority does not grant the President the power to formulate a country of origin rule for § 204 agreements, other than the established substantial transformation test. As indicated, *supra*, the substantial transformation test is recognized and well-established in cases involving country of origin determinations. *See Ferrostaal Metals Corp. v. United States*, 664 F. Supp. 535, 537-38 (Ct. Int'l Trade 1987) (relying on substantial transformation precedent to determine if Japanese steel processed in New Zealand was subject to a bilateral agreement that provided a quota on Japanese steel); *see also Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556, 562 (1908). Target also makes the related argument that because the U.S. Virgin Islands is not a foreign country, the President lacks the power to enact a regulation that changes the country of origin for goods that,

prior to the regulation, would have been products of an insular possession.

The Court of International Trade held that § 204's delegation of authority encompassed the power to depart from the substantial transformation test for determining the country of origin of goods subject to a § 204 agreement. The court further held that the suits were properly excluded on the basis of the interim regulation. We review the court's interpretation of the relevant statutes and regulations *de novo*. *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767 (Fed. Cir. 1993).

I.

Section 204 provides, in relevant part:

> The President may, whenever he determines such action appropriate, negotiate with representatives of foreign governments in an effort to obtain agreements limiting the export from such countries and the importation into the United States of any agricultural commodity or product manufactured therefrom or textiles or textiles products, and the President is authorized to issue regulations governing the entry or withdrawal from warehouse of any such commodity, product, textiles, or textile products to carry out any such agreement.

By its terms, the statute authorizes the President to negotiate agreements that limit textile imports and to promulgate regulations that implement § 204 agreements.

On May 9, 1984, the President issued an executive order directing the Secretary of the Treasury, in consultation with CITA, to issue regulations covering textiles and textile products subject to § 204. Executive Order No. 12475, 49 Fed. Reg. 19,955 (May 9, 1984). The executive order expressly directed the Secretary, to the extent necessary, to make "clarifications in, or revisions to, the country of origin rules . . . in order to avoid circumvention of . . . bilateral textile agreements." *Id.* Accordingly, Customs issued interim regulations

providing rules of origin for textiles and apparel, 49 Fed. Reg. 31,248 (Aug. 3, 1984), which were finalized in 1985, 50 Fed. Reg. 8710 (March 5, 1985). These regulations are codified at 19 C.F.R. 12.130 (1995). Paragraph (b) of the regulations provides that textiles and textile products manufactured or processed in more than one locale shall be a product of the place where "it last underwent a substantial transformation," except as provided in paragraph (c). 19 C.F.R. § 12.130(b) (1995).

Although the § 204 regulations adopted the last substantial transformation test, the Secretary also promulgated an exception to the test in paragraph (c) of the regulations, 19 C.F.R. § 12.130(c) (1986), now codified at 19 C.F.R. § 12.130(c)(1) (1995). Paragraph (c)(l) provides that textiles or textile products of the United States which are returned to the United States after having been advanced in value, improved in condition or assembled abroad cannot be considered products of the United States upon their return. 19 C.F.R. § 12.130(c)(1) (1995).

On April 14, 1993, the Customs Service published the interim regulation at issue, which added paragraph (c)(2). 58 Fed. Reg. 19,347 (1993); 19 C.F.R. 12.130(c)(2) (1995). Consistent with paragraph (c)(1), paragraph (c)(2) provides

> [u]nless otherwise required by law, the rules of origin applicable to products of the U.S. shall also apply to products of insular possessions of the U.S. Accordingly, notwithstanding paragraph (b) of this section, for purposes of section 204 . . . products of insular possessions of the U.S., if imported into the U.S. after having been advanced in value, improved in condition, or assembled, outside the insular possessions shall not be treated as products of those insular possessions.

Prior to the interim regulation, a garment that was cut in an insular possession and then assembled in a foreign country could be shielded from textile quota restrictions covering that foreign country, because the garment could be classified as a product of the insular possession under the existing standards. *See* 58 Fed. Reg. 19,347, 19,348 (April 14, 1993). By pro-

viding for similar treatment of all textile products that are sent abroad for further processing, whether they are sent from the United States or an insular possession, the interim regulation addressed the concern that textile import restrictions were being circumvented by manufacturers in insular possessions who sent garment pieces to foreign countries for assembly while enjoying "more favorable quota and visa treatment than textile and textile products produced in the United States." *Id.*

II.

Target does not dispute the fact that the interim regulation was aimed at eliminating the potential advantage enjoyed by garment cutting operations located in insular possessions. Rather, Target asserts that the regulation exceeds the authority delegated to the President in § 204. We disagree.

The grant of authority to the President under § 204 is broad. *American Ass'n. of Exporters and Importers-Textile and Apparel Group v. United States*, 751 F.2d 1239, 1247 (Fed. Cir. 1985) (*AAEI-TAG*); *Mast Indus., Inc. v. Regan*, 596 F. Supp. 1567, 1575 (Ct. Int'l Trade 1984) (recognizing § 204's broad delegation). Section 204 "imposes no restrictions on the President's administration of the textile trade program. There are no procedural requirements nor limitations. . . . All that is needed is that the President's action be relevant to the enforcement of some existing textile agreement." *AAEI-TAG*, 751 F.2d at 1247. Although *AAEI-TAG* specifically addressed the imposition of import restrictions on textiles under § 204, it clearly establishes that the President has broad discretion under § 204.

The President's power under § 204 is further augmented by his constitutional power in the international arena: "legislation conferring upon the President discretion to regulate foreign commerce invokes, and is reinforced and augmented by, the President's constitutional power to oversee the political side of foreign affairs." *AAEI-TAG*, 751 F.2d at 1248; *see Florsheim Shoe Co. v. United States*, 744 F.2d 787, 793 (Fed.

Cir. 1984) (citations omitted) (counselling against narrow constructions of Congressional authorization in the foreign affairs area).

As the trial court correctly held, the interim regulation is relevant to the enforcement of the bilateral agreements implementing the textile program, such as the textile agreement with the Dominican Republic. The interim regulation directly affects whether an imported good must be charged against a particular country's quota. As it defines what goods the United States believes are subject to § 204 quotas, the interim regulation serves to "carry out" § 204 bilateral agreements.

Nevertheless, Target essentially argues that § 204 only grants authority to regulate the products and exports of foreign countries. Because the substantial transformation test predated the enactment of § 204, Target reasons that the regulations cannot reach products that last underwent a substantial transformation in an insular possession rather than a foreign country. Congress, however, has the power to legislate country of origin rules. Section 204 is a broad delegation of Congress' foreign commerce power, and by its terms, the delegation includes legislative power to promulgate rules relevant to § 204 agreements. There is no persuasive evidence, in either the text or the legislative history surrounding § 204, establishing that Congress intended to grant the President this broad authority, but at the same time to withhold from him the power to promulgate, when appropriate, a country of origin rule that differs from the customary test.

In addition, the interim regulation does not improperly impact insular possessions. The goods covered by the regulation must have been advanced in value or similarly processed in a foreign country. This nexus between the product and a foreign country brings the interim regulation squarely within the scope of the statute.

Target also argues that the interim regulation violates the longstanding principle in customs law that goods should have one country of origin for all purposes. Target notes that under the interim regulation, a textile product might have one place of origin for quota purposes and another place of origin for

duty and marking purposes. It is recognized, however, that a § 204 regulation may cause a product to have one country of origin for quota purposes and a different origin for other trade purposes. *Yuri Fashions Co. v. United States*, 632 F. Supp. 41, 46 (Ct. Int'l Trade 1986), *aff'd* 804 F.2d 1246 (Fed. Cir. 1986) (adopting the trial court's opinion), *cert. denied*, 481 U.S. 1004 (1987). The practice of assigning only one country of origin is not a substantive limitation on the broad delegation of foreign commerce power to the President pursuant to § 204.

Lastly, Target maintains that § 204 must be construed as prohibiting the interim regulation because if allowed to stand, the regulation violates the bilateral agreement between the United States and the Dominican Republic. In *AAEI-TAG*, however, we recognized that § 204 is a broad delegation of authority, bolstered by the President's constitutional power. 751 F.2d at 1245-47. Therefore, we do not discern any reason to adopt Target's narrow construction of the statute.

III.

Conclusion

For the reasons stated above, the decision of the United States Court of International Trade is affirmed.

AFFIRMED.

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 93-12-00833

Slip Op. 95-7

TARGET SPORTSWEAR, INC.,

Plaintiff,

—v.—

UNITED STATES,

Defendant.

OPINION AND ORDER

[Plaintiff's motion for partial summary judgment denied; defendant's cross-motion for summary judgment granted; action dismissed.]

Dated: January 23, 1995

Wasserman, Schneider & Babb (*Jack Gumpert Wasserman*, *Bernard Babb* and *David M. Steiner*, Esqs.); *Howard P. Roy*, General Counsel, Target Sportswear, Inc., of counsel, for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Robert J. Krask*, Esq.); *David J. Weiler*, Office of the Chief Counsel for Int'l Commerce; *Laura R. Siegel*, General Attorney, Office of the

Assistant Chief Counsel, Int'l Trade Litigation, U.S. Customs Service, of counsel, for defendant.

Rosalie Simmonds Ballentine, Attorney General of the Virgin Islands (*Joseph M. Erwin*, Assistant Attorney General (Tax), Virgin Islands Dep't of Justice and *Winston & Strawn* (*Peter N. Hiebert*, Esq.) of counsel, *Amicus Curiae* in support of plaintiff.

OPINION

NEWMAN, *Senior Judge*:

Introduction

A rejection by the United States Customs Service ("Customs") of plaintiff's entry of men's suits exported from the U.S. Virgin Islands due to plaintiff's failure to submit an export visa from the Dominican Republic, where the suits were assembled, showing compliance with quota restrictions on Dominican Republic textile products, as required by a 1993 interim regulation, precipitated this litigation.

Section 204 of the Agricultural Act of 1956, as amended, 7 U.S.C. § 1854 ("§ 204"), authorizes the President to negotiate agreements with foreign governments to limit the quantity of imports into the United States of textiles and textile products of such foreign countries and to issue regulations to carry out such agreements. Plaintiff, Target Sportswear, Inc. ("Target"), a United States importer of men's suits from the U.S. Virgin Islands, challenges the validity of 19 C.F.R. § 12.130(c)(2), effective May 14, 1993, T.D. 93-27, an interim regulation promulgated by the Commissioner of Customs concerning rules of country of origin for textiles and textile products imported from insular possessions, including the U.S. Virgin Islands ("interim regulation").[1]

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[1] On April 14, 1993, the interim regulation was published in the Federal Register, *Country of Origin of Textile Products From U.S. Insular Possessions*, 58 Fed. Reg. 19347, 19349 (April 14, 1993) and became effective 30 days later, on May 14, 1993. Interim Regulation 19 C.F.R.

At issue is the scope of the President's congressionally-delegated authority in conformance with § 204 to issue country of origin regulations to carry out textile trade agreements negotiated pursuant to the statute.[2] Specifically in dispute is the President's authority to make a narrow exception to the "substantial transformation" test prescribed in § 12.130(b) under which regulation the country or territory in which merchandise last underwent a "substantial transformation" is regarded as the country of origin.

Under the exception created by the challenged interim regulation, textile products substantially transformed in an insular possession, shipped to a foreign country for assembly or other processing, returned to the insular possession, and then exported to the United States are treated by Customs as a product of the foreign country rather than as a product of the insular possession for purposes of implementing quotas established by the foreign country's textile trade agreement with the United States.

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§ 12.130(c)(2), published as T.D. 93-27, added part (c)(2) to the original country of origin regulation § 12.130 finalized in T.D. 85-38, 50 Fed. Reg. 8710 (March 5, 1985).

[2] Fundamentally, under the U.S. Constitution the authority to regulate foreign commerce and trade with other nations lies exclusively with the Congress. U.S. Const., Art. I, § 8, cl. 3; Congress may delegate such authority to the Executive. *California Bankers Association v. Schultz*, 416 U.S. 21, 59 (1974); *Chicago and Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933).

Although in this opinion the court refers to the interim regulation as issued by the President, in actuality the Customs Service promulgated the interim regulation at the request of the Committee for the Implementation of Textile Agreements ("CITA"), which was established by Executive Order 11651 on March 2, 1972 to supervise the implementation of textile trade agreements. Section 2(a) of that Executive Order requires the Commissioner of Customs to take such actions as CITA, through its Chairperson, recommends to carry out agreements entered into by the United States under section 204 of the Agricultural Act of 1956. The Customs Service's notice announcing its promulgation of the interim regulation states that it was issued pursuant to authority granted by the Congress to the President in § 204.

Essentially, then, the primary issue is whether the delegation of authority to the President to administer the United States' textile trade program under § 204 encompasses the authority to issue or to amend rules of origin for textiles and textile products substantially transformed in a United States insular possession and also processed in at least one foreign country or territory.

The resolution of this issue is obviously of critical economic importance to exporters and United States importers of textile and textile products from the United States insular possessions, assemblers and processors of textile products in foreign countries under quota restrictions imposed by textile trade agreements, United States textile manufacturers that compete in the marketplace with textile exports from United States insular possessions, the governments of the insular possessions having economic interests in attracting textile manufacturing and fostering an export trade to the United States, and of course, Customs which is charged with responsibility for monitoring the entry of goods covered by quotas under the textile trade program. The somewhat parallel legal and financial interests in the issues raised in this case by Target and the government of the U.S. Virgin Islands are evident from the fact that the latter, through its Attorney General, appears in this action in conformance with CIT Rule 76 and an order of this court dated April 14, 1994 as *amicus curiae* in support of Target's challenge to the interim regulation.

Target requests the court to rule: (1) as a matter of law the interim regulation is *ultra vires* and invalid; and (2) therefore, Customs must allow the entry of plaintiff's merchandise under Entry No. 122-4521169-8, dated December 9, 1993, consisting of men's wool suits, notwithstanding the provisions of § 12.130(c)(2), *supra*.

Background

Procedurally, this action contests the denial of plaintiff's protest to Customs pursuant to 19 U.S.C. §§ 1514(a)(4) and 1515 against the rejection by Customs on December 10, 1993

of plaintiff's Entry No. 122-4521169-8, dated December 9, 1993, covering twelve men's suits made of 100% worsted wool from India cut into suit components in the U.S. Virgin Islands, sewn in the Dominican Republic, shipped to the Virgin Islands for finishing and then exported to the United States. Customs denied entry to plaintiff's goods because plaintiff failed to present with the entry a textile export visa issued by the Dominican Republic, wherein the fabric was sewn, as required by the interim regulation. This interim regulation requires that importers of textile products processed in a foreign country but exported from insular possessions of the United States submit an export visa from the foreign government. Hence, under the interim regulation, the foreign country where the textiles or textile products were merely assembled and sewn prior to importation from an insular possession is regarded as the "country of origin" for quota purposes, notwithstanding that the goods exported to the United States were "substantially transformed" in the insular possession.

Jurisdiction to review denial of protests is predicated on 28 U.S.C. § 1581(a), and accordingly, this action is before the court for *de novo* review. 28 U.S.C § 2636. Currently *sub judice* are plaintiff's motion for partial summary judgment under CIT Rule 56 on count one of a two count complaint[3] and defendant's response and cross-motion for summary judgment or to dismiss this action in its entirety. The court has reviewed the Statements of Material Facts Not in Dispute filed by the parties and finds there is no genuine issue as to any material fact and the cross-motions raise only a question of law.

On the legal issue presented under count one of the complaint of whether the interim regulation is *ultra vires*, the court holds that the regulation is valid, plaintiff's suits exported from the U.S. Virgin Islands were properly denied

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[3] Count two of the complaint alleges economic hardship incurred by Target as a result of enforcement of the interim regulation and seeks a permanent injunction against enforcement of the interim regulation by Customs based on invalidity, as alleged in Count one of the complaint.

entry by Customs because plaintiff failed to submit with its entry an export visa from the Dominican Republic where the suits were assembled, and that as a matter of law defendant is entitled to summary judgment dismissing the action. *See Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F. 2d 1560 (Fed. Cir. 1987); *Mingus Constructors, Inc. v. United States*, 812 F. 2d 1387 (Fed. Cir. 1987); *Barmag Barmer Maschinenfabrik AG v. Murata Machines*, 731 F. 2d 831 (Fed. Cir. 1984).

Pertinent Statute and Regulations

Statute:

Section 204 of the Agricultural Act of 1956, as amended, 7 U.S.C. § 1854 (1988) provides:

> The President may, whenever he determines such action appropriate, negotiate with representatives of foreign governments in an effort to obtain agreements limiting the export from such countries and the importation into the United States of any * * * textiles or textile products, and the President is authorized to issue regulations governing the entry or withdrawal from warehouse of any such * * * textiles, or textile products to carry out any such agreement. * * *

Regulations:

19 C.F.R. § 12.130(b) (1993):

> (b) *Country of origin.* For the purpose of this section and except as provided in paragraph (c), a textile or textile product, subject to section 204, Agricultural Act of 1956, as amended, imported into the customs territory of the United States, shall be a product of a particular foreign territory or country, or insular possession, of the U.S., if it is wholly the growth, product, or manufacture of that foreign territory, or country, or insular possession.

However, except as provided in paragraph (c), a textile or textile product, subject to section 204, which consists of materials produced or derived from, or processed in, more than one foreign territory or country, or insular possession of the U. S., shall be a product of that foreign territory, or country, or insular possession where it last underwent a substantial transformation. A textile product will be considered to have undergone a substantial transformation if it has been transformed by means of substantial manufacturing or processing operations into a new and different article of commerce.

19 C.F.R. § 12.130(c) (2) (1993), the interim regulation at issue:

(c) *Articles exported for processing and returned.*

(2) *Applicability to U. S . insular possession products processed outside the insular possession.* Unless otherwise required by law, the rules of origin applicable to products of the U. S. shall also apply to products of insular possessions of the U. S. Accordingly, notwithstanding paragraph (b) of the section, for purpose of section 204, * * * products of insular possessions of the U. S., if imported into the U. S. after having been advanced in value, improved in condition, or assembled, outside the insular possessions shall not be treated as products of those insular possessions.

Parties' Contentions

Count one of the two count complaint requests declaratory relief to the effect that the interim regulation is outside the President's authority under § 204, and therefore, as a matter of law is *ultra vires*, and seeks to overturn Customs' exclusion from entry of plaintiff's merchandise exported from the U.S. Virgin Islands because plaintiff failed to submit an export visa from the Dominican Republic. Plaintiff posits,

based on a number of inextricably linked grounds addressed below, that § 204 authorizes the President to negotiate and conclude textile trade agreements imposing quotas only with regard to *foreign governments*, whereas the interim regulation imposes quotas on products of insular possessions (which are not foreign countries), thus exceeding the scope of the authority delegated in § 204.

Defendant, on the other hand, emphatically denies that the interim regulation imposes quotas on textile products of the U.S. Virgin Islands and maintains that the interim regulation is within the President's broad authority under § 204 to issue regulations to administer the Government's textile trade program and to "carry out" bilateral textile trade agreements between the United States and foreign countries—in this case the Dominican Republic. Defendant further argues that Target's complaint, in part, sets forth claims that are not justiciable and fail to state a claim upon which relief can be granted.

The Facts

The relevant facts are straightforward and undisputed.

The U.S. Virgin Islands, purchased from Denmark in 1916,[4] is an insular possession of the United States under the Act of March 3, 1917, ch. 171, 39 Stat. 1132 *et seq.*, codified at 48 U.S.C. §§ 1392 *et seq.* In this case, Target's affiliated exporter in St. Croix, U.S. Virgin Islands cut unmarked fabric, suit lining and interlining materials into garment pieces for men's wool suits, such garment pieces were joined to form components of the garments where appropriate, and then all components and suit parts were shipped to the Dominican Republic for assembly and sewing. Unfinished assembled suits sewn in the Dominican Republic were then returned to the U.S. Virgin Islands, completed and exported to the United States.

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[4] *See Convention on Cession of Danish West Indies*, Aug. 4, 1916, U.S.-Den., T.S. No. 629.

On January 20, 1989, the United States and the Dominican Republic entered into a bilateral textile trade agreement limiting the quantities of certain textile products which could be exported to the United States. The Dominican Republic agreed to control exports by the issuance of export visas. The bilateral trade agreement between the United States and the Dominican Republic, among other things, establishes a quota upon the number of men's and boy's wool suits that may be imported into the United States. The availability of such visas is limited because the quantity exported is controlled by the quota for the particular category of goods in question under the trade agreement.

On December 9, 1993 plaintiff, the importer of record or consignee of the subject merchandise, attempted to enter for consumption its wool suits at JFK International Airport by presenting Entry No. 122-4521169-8 and accompanying documents. On December 10, 1993 Customs, in compliance with the interim regulation, refused to allow entry of plaintiff's suits on the ground that the suits were advanced in value, improved in condition, or assembled outside the insular possessions—*viz.*, in the Dominican Republic—and plaintiff had failed to present a textile visa from the Dominican Republic, as required by the interim regulation.

Finally, defendant concedes that Customs issued ruling letter CLA-2 CO:R:CV:V 554027 MBH, dated January 13, 1987, long prior to the 1993 interim regulation, which letter concludes that manufacturing operations in the Virgin Islands resulting in "substantial transformation" create products of the U.S. Virgin Islands for purposes of Headnote 3(a) of the Harmonized Tariff Schedule of the United States, and that assembly operations in the Dominican Republic do not constitute a "substantial transformation."

Discussion

I.

Section 204, so far as pertinent, authorizes the President to: (1) negotiate agreements with foreign governments limiting the exportation of textiles and textile products to the United States; and (2) promulgate regulations to "carry out" such agreements. Customs, at the recommendation and direction of the Committee for the Implementation of Textile Agreements ("CITA") (which by Executive Order 11651 of March 3, 1972 supervises the implementation of textile agreements), promulgated the interim regulation in dispute. As previously noted, Target vigorously insists that the interim regulation exceeds the authority granted by Congress to the President in § 204 to promulgate regulations implementing textile agreements with foreign governments because the interim regulation imposes quotas on textiles from insular possessions.

Fundamentally, of course, the President's exercise of Congressionally delegated authority in matters concerning international trade must be within the scope of the authority granted and comply with procedures prescribed by Congress (if any); conversely, regulatory action taken, ostensibly pursuant to the President's authority under the statute, but beyond the scope of the delegated authority or in noncompliance with prescribed procedures, is *ultra vires* and void. *See United States v. Schmidt Pritchard & Mangano Cycles Co.*, 47 CCPA 152, C.A.D. 750, *cert. denied*, 364 U.S. 919 (1960); *United States v. Best Foods, Inc.*, 47 CCPA 163, C.A.D. 751 (1960); *Luggage & Leather Goods Manufacturers of America, Inc. v. United States*, 7 CIT 258, 588 F. Supp. 1413 (1984).

Defendant maintains, and the court agrees, that cases relied on by plaintiff involving whether or not the President, in exercising delegated authority under a statute, complied with Congressionally-established procedures and limitations are readily distinguishable and have no bearing on the instant case because, as noted by the Federal Circuit in *American Association of Exporters and Importers-Textile and Apparel*

Group v. United States, 751 F.2d 1239, 1247 (Fed. Cir. 1985) ("American Association"), the law imposes no procedural requirements or limitations upon the President's implementation of the United States' textile program. All that the Government must do is "point to the proper authorizing provision and [show that the action taken was] rationally related to the provision's objective." *American Association*, 7 CIT 79, 583 F. Supp. 591, 598 (1984), *aff'd*, 751 F. 2d 1219 (1985).

The court agrees with defendant that the interim regulation readily satisfies that test and is "relevant to the enforcement of an existing textile agreement," *American Association*, 751 F.2d at 1247, the United States-Dominican Republic trade agreement. *See Mast Industries, Inc. v. Regan*, 8 CIT 214, 596 F. Supp. 1567, 1575 (1984) ("Mast I"). The interim rule of origin, an exercise of the broad delegation of authority to the President under § 204 to promulgate regulations to carry out trade agreements, is clearly relevant to the implementation, enforcement and effectiveness of existing textile agreements in achieving their goal of limiting textile imports into the United States. Mast I, 596 F. Supp. at 1575 (limitation of textile imports is the common purpose of § 204, The Multifiber Arrangement and bilateral textile trade agreements).

Consistent with the treatment of United States textile products sent abroad for further processing and then returned to the United States, *see* 19 C.F.R. § 12.130(c)(1), Customs deemed Target's merchandise to be a textile product of the Dominican Republic in conformance with the provisions of the interim regulation. As aptly pointed out by defendant in support of its argument that the interim regulation is authorized by § 204 because it meets the objective of the statute and Congressional policy of implementing existing trade agreements by precluding circumvention of quantitative restrictions on textile imports: "If section 204 only authorized the issuance of regulations governing imports of textile products which have been last substantially transformed in a foreign country and exported from that country, as Target argues, Pl. Br. 27, soon every insular possession would be used as a platform for importing textiles into the United States in order

to evade quantitative restrictions contained in bilateral trade agreements. While that might foster the economic development of the insular possessions, it would obviously blunt 'the common purpose of Section 204, the MFA and the bilaterals . . . to limit imports of textiles' into the United States so as to protect the domestic textile industry. Mast I, 596 F. Supp. at 1575." Deft. Br. at 20.

There is no dispute that plaintiff's goods underwent substantial transformation in the U.S. Virgin Islands prior to the assembly and sewing operations in the Dominican Republic. Plaintiff correctly states that where statutory language in a tariff provision requires a determination of country of origin, it has long been a basic tenet of Customs Law, as judicially and administratively articulated (and now codified in 19 C.F.R. § 12.130(b)), that an imported article's country of origin is the country or place where it last underwent a "substantial transformation," that is, the last location where a new and different article emerged, *see Bellcrest v. United States*, 741 F. 2d 1368 (Fed. Cir. 1984); *Anheuser-Busch Brew. Assoc. v. United States*, 207 U.S. 556, 562 (1908); *Superior Wire v. United States*, 11 CIT 608, 613-14, 669 F. Supp. 472, 477-78 (1987), *aff'd*, 867 F. 2d 1409, 1413-14 (1989) and *Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 472-74, 664 F. Supp. 535, 537-38 (1987); *Rules of Origin Applicable to Imported Merchandise*, 59 Fed. Reg. 141, 142 (Jan. 3, 1994); 19 Cust. Bull. 58, 64-65, T.D. 85-38 (proposing rules to add more certainty and uniformity to the substantial transformation test). Indeed, prior to the interim regulation, plaintiff requested and received two Ruling Letters from Customs Headquarters. These rulings concluded that manufacturing operations in the Virgin Islands resulting in a "substantial transformation" create "products of the U.S. Virgin Islands" for purposes of Headnote 3(a) of the Harmonized Tariff Schedule of the United States. Customs also ruled that the partial assembly operations in the Dominican Republic would not constitute "substantial transformation." Customs Service Headquarters Rulings CLA-2 CO:R;CV;V 554027 MBH (January 13, 1987); CLA-2 CO:R:CV:V 554025 MBH (Dec. 16,

1986). Thus, there can be no dispute that prior to the interim regulation, substantial transformation was judicially and administratively a well-embedded test for country of origin determinations.

Unfortunately for plaintiff, the plethora of judicial authority and administrative pronouncements concerning determination of country of origin prior to the interim regulation do not address the precise issue here of the President's authority under § 204 to make an exception in the substantial transformation test for goods processed in one or more foreign countries. In the final analysis, there is no evidence whatever of Congressional intent in § 204 that there may be no exception from the substantial transformation test.

Moreover, the rationale of *Cardinal Glove v. United States*, 4 CIT 41, 43-44 (1982), involving a determination of country of origin where there is "exportation of merchandise from a country producing a product to an intermediate country for the purpose of processing, manipulating, or assembling that product," (4 CIT at 43-44), heavily relied on by plaintiff, was expressly rejected as unsound legal authority by the Federal Circuit in applying the country of origin rules promulgated by Customs. *Mast Industries, Inc. v. United States*, 11 CIT 30, 652 F. Supp. 1531, *aff'd*, 822 F. 2d 1069, 1073-74 (1987) (*Mast II*). Indeed, *Mast II* eschews reliance generally upon case law developed before the original rules of origin. *Mast II*, 855 F.2d at 1073-74 ("caselaw is considered the source of the evil the regulation was meant to correct, and thus is something to avoid, not to seek out for guidance").

From the premise that substantial transformation was the judicial and administrative test of choice for country of origin determinations at the time the interim regulation was issued, plaintiff draws the dubious deduction that under § 204 Congress intended the substantial transformation test be an absolutely inviolable criterion for all country or origin determinations regardless of the statutory purpose of the determination, unless *Congress itself* sanctioned an exception, *i.e.*, section 805(d)(1) of the Steel Import Stabilization Act, 19 U.S.C. § 2253; Headnote 2, Schedule 8, Part 1, Tariff Sched-

ules of the United States. Implicit in plaintiff's reasoning is that legislative power to make an exception to the substantial transformation test for country of origin purposes is not delegable to the President under § 204 to implement the textile trade agreement program. The court cannot agree.

Defendant's position that the delegation of authority under § 204 is sufficiently broad to empower the President to make the exception in the substantial transformation test set forth in the interim regulation is supported by controlling judicial authority addressing the broad reach of the President's authority under § 204 to implement textile trade agreements.

Thus, in *American Association, supra*, which involved a challenge to the exercise of the President's authority under § 204 in connection with certain import restrictions on Chinese textiles, the Federal Circuit observed regarding the President's authority:

> On the contrary, the beginning of Section 204 says that the President "may, whenever he determines such action appropriate"—*and that preamble covers, not only negotiation with foreign representatives, but also the issuance of regulations "to carry out" the negotiated agreements.* That is a broad grant of authority to the President in the international field in which the *congressional delegations are normally given a broad construction.*

Id. at 1247 (citations omitted, emphasis added).

Importantly, the court also stated:

> [Section 204] * * * imposes no restrictions on the President's administration of the textile trade program. There are no procedural requirements nor limitations. We find no basis, either within section 204 itself, the overall statutory scheme, or of legislative history, to add more to the statute than meets the eye. *All that is needed is that the President's action be relevant to the enforcement of some existing textile agreement.*

Id. (emphasis added). That appears to be the precise situation regarding the interim regulation and the United States-Dominican Trade Agreement.

Other decisions construing § 204 as a broad grant of authority to the President to issue regulations implementing textile trade agreements are: *Yuri Fashions, Inc. v. United States*, 10 CIT 189, 632 F. Supp. 41, *aff'd*, 804 F. 2d 1246 (1986) (adopting CIT's opinion), *cert. denied*, 481 U.S. 1004 (1987) (upholding rules of origin, § 12.130(b), pertaining to textile products imported into the United States from insular possessions as opposed to foreign countries); *Mast I*, 596 F. Supp. at 1575 (original country of origin regulations held to be a valid exercise of the President's authority under section 204; Congress' delegation to the President in the foreign affairs arena should be broadly construed, rather than " 'hemmed in or cabined, cribbed, confined by anxious judicial blinders' ").

Defendant additionally stresses that the 1993 interim regulation's country of origin rule was merely an extension of long-standing Executive policy and action in implementing textile trade agreements by country of origin rules *to avoid circumvention of quota restrictions under textile trade agreements*.

Thus, on May 9, 1984 the President directed the Secretary of the Treasury, in consultation with CITA, to issue regulations designed "to prevent circumvention of multilateral and bilateral agreements to which the United States is a party and to facilitate efficient and equitable administration of the United States Textile Import Program. Exec. Order 12,275, 40 Fed. Reg. 16,645 (1984). Among other things, the President directed that, as necessary, such regulations should clarify or revise textile country of origin rules. *Id.*

Soon thereafter, in accordance with policy guidance from CITA, the Secretary of the Treasury issued interim rules of origin for textiles and apparel, 49 Fed. Reg. 31,248 (Aug. 3, 1984), which were finalized in 1985, 50 Fed. Reg. 8,710 (March 5, 1985), and codified at 19 C.F.R. § 12.130. For textiles and textile products produced or manufactured in more than one foreign country, foreign territory, or insular possession of the United States, these rules of origin provided that the textile or textile product at issue should be deemed to

be "a product of that foreign territory or country, or insular possession where it last underwent a substantial transformation." 19 C.F.R. 12.130(b). The rules define a "substantial transformation" to mean "transformed by means of substantial manufacturing or processing operations into a new and different article of commerce." *Id.*

However, by the 1993 interim regulation, Customs in a limited departure from its long-time reliance upon the substantial transformation test, following policy guidance provided by CITA, revised in part, the rules of origin for textiles and textile products produced in an insular possession and then subjected to additional processing in a foreign country or territory. 58 Fed. Reg. 19,437 (1993). Instead of continuing to treat a textile product as a product of the foreign country or territory or insular possession where it was last substantially transformed, 19 C.F.R. § 12.130(b), the interim regulation carves out an exception to the substantial transformation test previously established in the original rules of origin.

According to defendant, supported by an affidavit of July 8, 1994 executed by Rita D. Hayes, Chairman, Committee for the Implementation of Textile Agreements (CITA):

> This change in the rules of origin arose, in part, as a result of a ruling request directed to the Customs Service in August 1991. That request prompted concern that the then current rules of origin appeared to allow "all insular possessions [to] be used as cutting tables for foreign fabric with assembly taking place in a foreign country while still allowing the goods to be considered a product of [an] insular possession and subject to quota." * * *
>
> The change also resulted from the concern that the then current rules of origin placed United States' textile producers and workers at a competitive disadvantage. * * * Specifically, "if a [United States] producer cut [United States] formed fabric into pieces in New York and shipped the pieces to a foreign country for mere assembly, the finished goods would be a product of that foreign country and subject to that foreign county's

> quota." * * * Under the then current rules of origin, however, an insular possession producer engaging in the same activities would be able to treat the textiles as products of the United States, not subject to quota, when imported into the United States. * * * Consequently, CITA and the Customs Service changed the rules of origin to address these concerns.

Def't Mem. at 8-9 and attached exh. E.

Consistent with the treatment of United States textile products sent abroad for further processing and then returned to the United States, 19 C.F.R. § 12.130(c)(1),[5] and in compliance with the interim regulation, Customs deemed Target's merchandise sent to the Dominican Republic for assembly and sewing not to be a textile product of the U.S. Virgin Islands, notwithstanding such goods had been substantially transformed there, but rather as products of the Dominican Republic for quota purposes.

Judicial authorities cited by plaintiff involving the determination of country of origin under the substantial transformation test, *e.g.*, *Belcrest v. United States*, 741 F.2d 1368 (Fed. Cir. 1984) (determination of whether goods were a product of Hong Kong or the Peoples Republic of China for purposes of General Headnote 3(e), TSUS, based on substantial transformation test), are totally inapposite to the precise issue here of Presidential authority to make an exception from such test if deemed appropriate to "carry out" textile trade agreements. Stated otherwise, the issue here is not simply whether the statutory terms "product" or "growth, produce or manufacture" implicate the time-honored substantial transformation test for determining country of origin. Rather, the critical question to be resolved here is whether the scope of the President's authority to issue regulations under § 204 is sufficiently broad to make an exception in the substantial

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[5] The country of origin rules adopted in 1985 provided that any textile product which is returned to the United States after having been advanced in value or improved in condition abroad may not, upon its return, be considered as a product of the United States. The current rule is at 19 C.F.R. § 12.130(c).

transformation test if deemed appropriate by the President to advance the objectives of the trade agreements program. The court unequivocally responds in the affirmative.

By operation of the interim regulation's exception to the substantial transformation test for country of origin purposes, Target's products from the Virgin Islands are treated for quota purposes, not as products of an insular possession, but rather as products of the Dominican Republic. Plaintiff's argument that the interim regulation imposes quotas on textile products of insular possessions is simply a smokescreen for plaintiff's rejected contention that the substantial transformation test is dispositive of a product's country of origin, and such argument also obfuscates the thrust of the interim regulation merely to make an exception in the substantial transformation test for country of origin determinations and *not* impose quotas on products of insular possessions.

Plaintiff also objects that the interim regulation ambivalently results in the treatment of plaintiff's suits under the Customs Laws as both "foreign and not foreign." In that vein, plaintiff urges that on the one hand Customs regards plaintiff's suits as "products of" the U.S. Virgin Islands for purposes of preferential duty treatment and marking of country of origin, but on the other hand, as "products of" the Dominican Republic for quota purposes.[6] The fallacy of the argument that in Customs Law goods cannot be treated both as "foreign and not foreign," depending upon the purpose of the particular statute under consideration is demonstrated in the case of imports from insular possessions that would have been accorded a duty-free status if based solely on a substantial transformation country of origin test, but yet must be denied duty-free preference granted to United States insular pos-

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[6] Rules of origin apply in a variety of contexts, a few of which include: (1) the marking of products imported into the United States to disclose the country of origin, 19 U.S.C. § 1304(a); (2) the administration of quota limits, such as those on textiles (3) the determination of the appropriate rate of duty; the granting of certain trade preferences under the GSP, 19 U.S.C. §§ 2461-2466, and the Caribbean Basin Initiative, 19 U.S.C. §§ 2701-2706; (5) free trade agreements; and (6) the Buy American Act, 41 U.S.C. § 10a-10d.

sessions because the goods comprise foreign materials exceeding a prescribed percentage (*viz.*, 50 percent) of the total value of the imported goods, thus subjecting the goods to rates of duty applicable to foreign countries. *See* general note 3(a)(iv) of the Harmonized Tariff Schedules of the United States. *See also Yuri Fashions*, 632 F. Supp. at 47, which suggested that merchandise may be treated in one manner for textile rule of origin purposes (Korean) and another for duty and marking purposes (a product of the CNMI).

To buttress their mutual challenge to the interim regulation, Target and *amicus* each seeks to interject into the question of the intent of the statute, Congress' economic and trade policies of the 1980s manifested in the "special status" of the U.S. Virgin Islands by preferential duty status granted under the Harmonized Tariff Schedule of the United States, General Headnote 3(a)(iv), and the Caribbean Basin Economic Recovery Act of 1983, P.L. No. 98-67, § 214. 97 Stat. 369, 392-93, and other indicia of Congressional concern for the economic well-being of the insular possessions that are claimed-to militate against any Congressional intent to authorize the 1993 interim regulation.

Amicus, for instance, points out that prior to the interim regulation, the original rules of origin provided an important incentive for conducting textile manufacturing operations in the Virgin Islands. Under the original rules, if a textile product had undergone a "substantial transformation" in the U.S. Virgin Islands, the product could be sent to the Dominican Republic or other foreign country for further processing without losing its character as a product of an insular possession for quota purposes. According to *amicus*, the original rule promoted substantial manufacturing operations in the U.S. Virgin Islands and allowed producers to take advantage of lower labor costs in foreign countries in the Caribbean region for assembly and sewing operations, which were in short supply in the U.S. Virgin Islands.

Such economic policy arguments are simply another format for attacking the interim regulation by rehashing the rejected arguments that because the regulation unlawfully excepts sub-

stantial transformation as the test for country of origin, such regulation treats insular possessions as foreign countries and imposes quotas on their products. Moreover, plaintiff and *amicus* have failed to point to anything that suggests that preferential duty status granted by Congress, *see* General Note 3(a)(iv) of the HTSUS, was intended to extend to anything other than duty treatment or to any other program. *Yuri Fashions*, 632 F. Supp. at 46 ("nothing in the legislative history of the General Headnote 3(a) [to the Tariff Schedules of the United States] known to the court indicates that the headnote was intended to regulate anything other than rate of duty").

Further, it is obvious that the economic concerns and programs of the 1980s dredged up by plaintiff and *amicus* as manifesting a Congressional intent against the interim regulation, were not matters before Congress when it enacted § 204. Plainly, the wisdom of the President's policy choices in issuing the interim regulation in 1993 is not a matter for judicial review in determining whether the interim regulation is *ultra vires*. *American Association*, 751 F. 2d 1248; *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 79596 (Fed. Cir. 1984) (once it is determined that the President acted within the confines of the authority delegated to him, no further role for courts exists); *United States Cane Sugar Refiners Ass'n v. Block*, 69 CCPA 172, 683 F. 2d 399, 404 (1982) ("let the President's action be authorized, and let his action be within the authorizing provisions of the law he cites, and the role of the judiciary is at an end").

II.

Plaintiff maintains that the interim regulation violates the United States' obligations to the Dominican Republic under its bilateral textile trade agreement by charging products exported from the U.S. Virgin Islands against the quantitative limitations applicable to the Dominican Republic under its bilateral agreement, and Congress would not have intended such result under § 204. Citing *United States v. Gue Lim*, 179

U.S. 459, 465 (1900), plaintiff insists that § 204 should not be construed to vest the President with the power to violate United States international obligations to foreign governments by unilaterally reducing the quotas negotiated by the parties under the bilateral trade agreement.

Defendant contends that the issue of whether or not the interim regulation impairs the international obligations of the United States to foreign countries under bilateral textile trade agreements is a nonjusticiable foreign relations issue, and in any event plaintiff has no private right of action to enforce U.S. obligations to the Dominican Republic under the parties' trade agreement.

Plaintiff concedes it has no private right of action against the Government to enforce international obligations owed to the Dominican Republic under its textile trade agreement with the United States, but correctly maintains that it may challenge the interim regulation as *ultra vires* because, *inter alia*, it conflicts with United States obligations under textile trade agreements.

III.

Finally, plaintiff avers that it is entitled to the relief sought because plaintiff established its U.S. Virgin Islands operations in reliance on the original country of origin regulations and letter rulings mentioned *supra*. However, it is well settled that no one has a vested right to import or in the maintenance of an existing tariff status of the goods. *See Board of Trustees of Univ. of Illinois v. United States*, 289 U.S. 48, 57 (1933) ("[n]o . . . vested right to carry on foreign commerce with the United States"); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 318 (1933) ("[n]o one has a legal right to the maintenance of an existing rate of duty"); *Arjay Assoc., Inc. v. Bush*, 891 F. 2d 894, 896 (Fed. Cir. 1989) (no untouchable right to the continued importation of any product); *North Amer. Foreign Trading Corp. v. United States*, 783 F. 2d 1031, 1032 (Fed. Cir. 1986) (no vested right to a particular classification or rate of duty or preference).

Conclusion

For the foregoing reasons, it is hereby ORDERED:

1. Plaintiff's motion for partial summary judgment is denied;

2. Defendant's cross-motion for summary judgment is granted;

3. The action is dismissed.

Judgment will be entered accordingly.

Dated: New York, New York
January 23, 1995

/s/ BERNARD NEWMAN
BERNARD NEWMAN, SENIOR JUDGE

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 93-12-00833

TARGET SPORTSWEAR, INC.,

Plaintiff,

—v.—

UNITED STATES,

Defendant.

Before: Senior Judge Bernard Newman

JUDGMENT

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY, ORDERED, ADJUDGED, and DECREED:

1. Plaintiff's motion for partial summary judgment is denied;

2. Defendant's cross-motion for summary judgment is granted;

3. The action shall be, and hereby is, dismissed.

BERNARD NEWMAN
Senior Judge of the United States
Court of International Trade

Dated: New York, New York
January 23, 1995